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Case Comment

Al-Khawaja v United Kingdom (26766/05): criminal evidence - admissibility of hearsay evidence

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Legislation: European Convention on Human Rights 1950 art.6(1), art.6(3)(d)

Criminal Justice Act 2003

Cases: R. v Horncastle (Michael Christopher) [2009] UKSC 14 (SC)

Al-Khawaja v United Kingdom (26766/05) (2009) 49 E.H.R.R. 1 (ECHR)

*Cov. L.J. 37 The facts and the domestic proceedings

Al-Khawaja was charged with two counts of indecent assault on two female patients. One of the complainants, ST, having made a statement to the police, committed suicide prior to trial for reasons considered to be unrelated to the assault. At a preliminary hearing the judge held the statement by the complainant to be admissible by virtue of s.23 Criminal Justice Act 1988. If the statement had not been admissible there would have been no case against the defendant for assault of ST. The judge considered that the defence could challenge the statement and/or the credibility of ST by the cross-examination of other witnesses. At trial the judge directed the jury to bear in mind that ST had not given oral evidence and had not been subject to cross-examination. Al-Khawaja appealed against his conviction regarding the pre-trial ruling to admit the statement and (what the defence considered to be) an inadequate summing up by the trial judge regarding the disadvantage faced by the appellant by the admission of this statement. The appeal was dismissed. The Court of Appeal held that the trial as a whole was fair. The admission of the statement made by the deceased complainant did not automatically infringe article 6(1), the right to a fair trial, and article 6(3)(d) 'the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.' With regard to the judge's summing up, the court was of the view that the judge could have given a stronger warning regarding the disadvantage to the defence and should have indicated to the jury that as this witness could not be cross-examined her evidence should carry less weight. However, this did not render the appellant's trial unfair.

Tahery was charged with wounding with intent, following the stabbing of S, and with attempting to pervert the course of justice, as a consequence of telling the police he had seen two black men stab S. At the time of the incident none of the witnesses implicated Tahery in the attack. However, two days later T made a statement to the police in which he said he had seen Tahery stab S. At trial T refused to give evidence through fear for his safety. The trial judge was satisfied that T's fear was genuine and allowed the statement to go before the court pursuant to s.116(2)(e) of the Criminal Justice Act 2003. The judge warned the jury that the defence had not had the opportunity to cross-examine the maker of the statement and on appeal the appellant argued that the lack of an opportunity to cross-examine T had infringed his right to a fair trial. The Court of Appeal dismissed the appeal; although the statement was highly probative evidence, the defence had the opportunity to cross-examine other *Cov. L.J. 38 prosecution witnesses and the appellant himself could give evidence to prevent unfairness.

The decision of the European Court of Human Rights

Before the European Court of Human Rights both applicants alleged that the admission of the statement without the opportunity to cross-examine the maker infringed their right to a fair trial under

article 6(1) and 6(3)(d).

The applicants relied primarily on *Luca v Italy* (2003) 36 EHRR 46, arguing that in light of the case law a conviction based solely or decisively on depositions made by a person whom the accused has no opportunity to cross-examine is incompatible with article 6. The government argued that article 6(3)(d) is not an absolute right and that the legislation in question provided sufficient safeguards to prevent a violation of article 6.

All relevant parties were in agreement that in each case the statement was the sole or decisive evidence on which the conviction was based and the Court proceeded on this basis. The Court held that article 6(3)(d) is one of the minimum rights to be accorded to anybody charged with a criminal offence. It is an express guarantee and not just an illustration of a matter to be taken into account when considering whether the accused has had a fair trial. The Court was of the view that in neither case were there measures that could counterbalance the prejudice to the applicants nor could any judicial direction counterbalance this prejudice where the untested statement was the sole or decisive basis for the conviction. They held that, in respect of both applicants, there was a clear violation of article 6(1) and article 6(3)(d).

Commentary

The judgment of the ECtHR makes it clear that it considers the rights listed in article 6(3) to be minimum rights which constitute express guarantees. Where article 6(3)(d) is infringed and the evidence is the sole or decisive evidence the Court was of the view that, in the absence of 'special circumstances', neither counterbalancing measures nor any direction by the judge will be sufficient to provide the accused with a fair trial. This does not therefore mean that such evidence should never be admissible but that there must be 'special circumstances'. The Court did not consider in any detail what might amount to 'special circumstances' though it is clear that such circumstances are far narrower than the current domestic provisions for the admissibility of hearsay evidence. The Court did, however, give one example when referring to the case of *R v Sellick and Sellick* [2005] EWCA Crim 651, where the defendants had allegedly intimidated the witnesses who were then too frightened to give evidence. If this were not the case the defendant could benefit from witness intimidation which would clearly be unacceptable. The judgment is unequivocal regarding the fact that the safeguards in place were not sufficient to provide the applicants with a fair trial.

It is not surprising that the United Kingdom Government requested that this decision be referred to the Grand Chamber given the potential impact on the admissibility of certain hearsay evidence. In addition, just over four months after the decision in *Al-Khawaja* and prior to the referral to the Grand Chamber, the Court of Appeal, in ***Cov. L.J. 39** *Horncastle* [2009] EWCA Crim 964, when faced with very similar circumstances to the above, concluded that the provisions of the 2003 Act provide a balance that is compliant with the Convention. The Panel of the Grand Chamber adjourned consideration of the referral request pending the judgment of the Supreme Court in *Horncastle.* The Supreme Court, *Horncastle* [2009] UKSC 14, agreeing with the Court of Appeal, dismissed the appeals.

The admissibility of all hearsay evidence in criminal proceedings is now covered by the Criminal Justice Act 2003. The relevant sections (ss.114 - 136) were drafted following a review by the Law Commission of the law in relation to the admissibility of hearsay evidence: Law Commission Consultation Paper No 138 (1995) and Report No 245 (1997). Interestingly, in their consultation paper, having considered the relevant case law in depth, the Law Commission concluded, at para 5.35, that:

'the use of hearsay evidence which consists of statements from people whom the defence has had (and will have) no chance to question is probably compatible with the Convention where questioning by the defence is genuinely impossible, but such evidence should not found a conviction if it stands alone'.

In their final report the Law Commission revised this view in the light of 'cogent and powerful' criticisms from 'respondents with substantial knowledge of the Convention' (para 5.33). Certain of these criticisms centred around the practical difficulties in requiring supporting evidence and a justifiable concern that, having just revised the law and removed for the most part the requirement for corroboration, a new set of technical and complex rules would come into being. In addition, there was a view that the Law Commission's original conclusion was overly cautious regarding the requirements of the Convention. As a consequence the Law Commission concluded that, provided adequate

safeguards were put in place, the Convention did not require supporting evidence and that hearsay could form the sole evidence against the defendant. Their draft bill, including safeguards, formed the basis of the relevant sections of the 2003 Act.

Horncastle involved two conjoined appeals which concerned the admissibility of hearsay statements in similar circumstances to *Al-Khawaja and Tahery.* In the first appeal (Horncastle and Blackmore) the witness had died but had made a full written statement before he died and in the second appeal (Marquis and Graham) the witness, who had made a statement, was too frightened to testify. In both cases these hearsay statements were admissible under the provisions of the 2003 Act and the appellants argued that as a consequence of the decision in *Al-Khawaja and Tahery* the admissibility of these hearsay statements infringed their right to a fair trial as the convictions were based solely or to a decisive degree on this hearsay evidence. Although the domestic courts are not bound by the decision of the ECtHR they are obliged by virtue of s.2 of the Human Rights Act 1998 to take the judgment into account and in practice, if the decision of the ECtHR is directly on the point covered in domestic law, the domestic courts will follow it. In its judgment the Supreme Court clarified that although this would normally be the position there are 'rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process' [paragraph 11]. In the case of *Horncastle* the Supreme Court was of the view that the ***Cov. L.J. 40*** domestic law in relation to hearsay has developed taking into account the aspects of a fair trial that article 6(3)(d) addresses. The review of the law of hearsay by the Law Commission culminated in the provisions of the 2003 Act which provide exceptions to the hearsay rule that are required in the interest of justice and that the provisions contain the necessary safeguards that render the sole or decisive rule unnecessary.

In *Horncastle* the statement of the witness who had died and of the witness who was too frightened to testify were both admissible under s.116 of the 2003 Act. Section 116(1)(b) requires that the person who made the statement is identified to the court's satisfaction. Therefore, both cases concerned absent but identified witnesses. In addition, where the witness is in fear, there is a requirement under s.116(2)(e) for leave of the court for the statement to be given in evidence. Under s.116(4) leave for admission of such a statement should only be given if the court considers the admission is in the interests of justice taking into account a range of factors including the statement's contents and the potential unfairness to any party in the proceedings. Additional safeguards within the hearsay provisions of the 2003 Act include s.124 which enables evidence relevant to the credibility of the absent witness to be put before the court; s.125 which provides that where a case is based wholly or partly on a hearsay statement and this evidence is so unconvincing that the conviction would be unsafe the court must direct the jury to acquit or order a retrial; and, s.126 which preserves the court's discretion to exclude evidence specifically the discretion under s.78 Police and Criminal Evidence Act 1984 to exclude prosecution evidence where to admit it would have such an adverse effect on the fairness of the proceedings that it should not be admitted.

The Supreme Court was of the view that the ECtHR had not adequately considered whether there was justification for imposing the sole or decisive rule equally to the continental and common law jurisdictions. The Supreme Court has provided a very comprehensive review of the case law designed to support its argument that in almost all cases the domestic courts would come to the same decision as the ECtHR without the application of the sole or decisive rule.

We must wait to see if, having taken into account the Supreme Courts analysis of the law, the Grand Chamber agrees that the 2003 Act provides the necessary safeguards and ensures that hearsay evidence is only admitted when it is fair to do so, or whether it upholds the decision in *Al-Khawaja* and if so the impact this might have on the domestic courts.

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